

## MEMORANDUM

DATE: June 16, 2011

TO: The Board of Environmental Protection

FROM: Beth Callahan, Project Manager, Bureau of Land & Water Quality

RE: The Androscoggin River Alliance (ARA), Terri Marin, Joelle Schutt, Ronald and Rachel Hamilton, James and Candace Alden, Richard J, Swanson, Richard Auren, Carol Ann and Larry LaRoche LaBossiere, Brendan McMorrow, Carol Perkins, Robert Benson and Julie Cameron, Mary and Austin Taylor, and John and Evelyn Sylvester Appeal of Site Location of Development Act and Natural Resources Protection Act Approval #L-25203-28-A-N/L-25203-TE-B-N, for BB Development, LLC to construct the Oxford Resort Casino – Phase I in the Town of Oxford, Oxford County

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**Statutory and Regulatory References:** The applicable statutory and regulatory framework for this application is the Site Location of Development Law (Site Law), 38 M.R.S.A. § 481-490; Site Location of Development Rules, Chapter 373 (1)&(5) and Chapter 375 (1)(4)(5)(6)(7)(8)(9)(10)&(14); the Natural Resources Protection Act (NRPA) § 480; the Wetlands and Waterbodies Protection Rules, 38 M.R.S.A. § 310 (5); and the Significant Wildlife Habitat Rules, 38 M.R.S.A. § 335 (9). The Site Location of Development Rules interpret and elaborate on the Site Law criteria, and the Wetland and Waterbodies Rules and the Significant Wildlife Habitat Rules interpret and elaborate on the NRPA criteria. In the sections pertinent to this appeal, the Site Rules guide the Department in its determination of whether a project has adequately made provisions for buffer strips and stormwater and whether a project would unreasonably adversely affect air quality, groundwater quality, noise, and scenic character. The Wetlands and Waterbodies Rules guide the Department in determining whether a project's impact on a protected natural resource The Significant Wildlife Habitat Rules guide the Department in its determination of whether a project's impacts on a significant vernal pool would be unreasonable. Procedures for appeals before the Board are outlined in the Department's Rules Concerning the Processing of Applications, Chapter 2(24)(B).

**Location:** The project site is located on the west side of Route 26 and the north side of Rabbit Valley Road in the Town of Oxford.

**Procedural History and Project Description:** On December 22, 2010, the applicant submitted a Site Law application and a NRPA application for the construction of Phase I of a multi-phase four-season commercial and entertainment resort facility, known as the Oxford Resort Casino. The proposed project consists of a 65,000 square foot building, one main entrance, one entrance for emergency use, two parking areas, and associated on-site utilities

During its review of the application and following issuance of a draft licensing decision, the Department received letters from non-abutting interested property owners within the community describing specific concerns about the proposed project.

The Department approved the permit applications on March 17, 2011. A timely appeal to the Board was filed on April 19, 2011 by the appellants listed above.

**Environmental Issues:**

1. FINANCIAL CAPACITY: Appellants argue that the applicant did not demonstrate adequate financial capacity to construct all phases of the Oxford Casino, including Phase I.

In its application, the applicant submitted a letter from a bank stating that the applicant has sufficient liquid assets that are immediately available to construct the site development for Phase I of the Oxford Resort Casino. The letter states that the applicant provided a cost estimate for site work from clearing and grubbing to final site stabilization. The applicant's estimate of costs includes earthwork for on-site building areas, but does not include the proposed building or interior work. In its review of the application, the Department considered the applicant's financial capacity for Phase I of the development as this is the only project for which the applicant seeks approval.

The applicant states that it demonstrated financial capacity to cover all relevant costs for the proposed project.

The Department recommends that the Board modify the Department's Order to provide that the applicant submits to the Department, for its review and approval, additional documentation of financial capacity that includes estimated and itemized total costs for the development of Phase I of the Oxford Resort Casino and evidence that the applicant has been granted a line of credit or a loan by a financial institution authorized to do business in this State or evidence of any other form of financial assurance permitted by Department Rules, Chapter 373(1) prior to any additional work being done on the project site.

2. NOISE & SCENIC CHARACTER: The appellants claim that the proposed project will adversely affect the area's environment and quality of life due to noise, lights, traffic, loss of scenic character and air pollution.

The applicant submitted a list of potential sources of noise from the development that could produce a minor noise impact. These sources include traffic, music at the entrance to the main facility, mechanical units and an emergency generator. The applicant stated that the noise generated by the proposed project is anticipated to be minor. The applicant also submitted a visual quality study that summarizes the visibility of the proposed project from various locations within 8 miles of the project site, a landscaping plan in which the applicant proposed to incorporate several types of vegetation at the project site, and a lighting plan in which lighting will be scaled to the development and fixtures will be sharp cutoff and downcast.

Based on its review of the project's location and design, the applicant's visual quality study and the applicant's plan for landscaping and lighting, the Department determined that the proposed project would not generate excessive operational noise and that the proposed project would not have an unreasonable adverse effect on the scenic character of the surrounding area.

3. BUFFERS: The appellants claim that the Department permitted an inadequate stream buffer. The appellants argue that the applicant measured a 100-foot setback from the thread of an existing stream instead of the edge of the normal high water line of that stream.

The applicant submitted a plan depicting the location of the stream and the proposed 100-foot riparian buffer adjacent to the stream. The applicant also submitted a draft of a forested, no disturbance Declaration of Covenants and Restrictions that protects the 100-foot stream buffer in perpetuity. The stream buffer is located approximately 660 feet west of the proposed building. The applicant described the functions and values of the stream as having principal functions of groundwater recharge/discharge, sediment/toxicant retention, and sediment/shoreline stabilization. The applicant further states that these functions of the stream are limited due to its small size, the stream does not support fish, and there are no special or unique features associated with the stream. The applicant contends that the difference in measuring from the thread of the stream versus the normal high water line is inconsequential due to the stream's narrow width and the applicant's use of straight, surveyed lines.

The Department visited the project site on November 19, 2010, and February 1, 2011. Department staff observed the existing, intermittent stream and documented its width and its location in relation to the project site. No fish were observed in the stream.

The Department considered the applicant's measurements of the proposed stream buffer, the size and value of the stream, and the applicant's provision for protection of the stream in its review of Phase I of the Oxford Resort Casino. The Department determined that the applicant's proposal for a 100-foot stream buffer was adequate provided that the applicant protect the buffer in perpetuity as outlined in the Department's Order.

4. STORMWATER: The appellants assert that the applicant did not provide adequate protection to Hogan Pond and connected waters.

Phase I of the Oxford Resort Casino proposes approximately 12.9 acres of new impervious area and 27.6 acres of new developed area. The proposed project lies within the watershed of the Little Androscoggin River and Hogan Pond. The applicant submitted a stormwater management plan based on the basic, general and flooding standards contained in the Department's Chapter 500 Stormwater Management Rules. Based upon results of the applicant's model using the phosphorous methodology under the general standards, the proposed stormwater treatment is expected to reduce the export of phosphorus in the stormwater runoff below the maximum permitted phosphorus export for the site.

The applicant's stormwater management system was reviewed by the Department's Division of Watershed Management (DWM). DWM recommended approval of Phase I of the Oxford Resort Casino and stated that the proposed stormwater management system was designed in accordance with the Chapter 500 basic, general and flooding standards.

Based on the stormwater system's design and DWM's review, the Department determined that Chapter 500 had been met provided that the applicant retained the services of a third party inspector, conducted a pre-construction meeting, and retained a professional engineer to inspect the construction and stabilization of the treatment system.

5. WATER SUPPLY: The appellants contend that the applicant did not demonstrate that Phase I development and full build-out of the Oxford Resort Casino will have adequate and healthful water supplies.

The applicant states that Phase I of the Oxford Resort Casino will use approximately 22,395 gallons of water per day when operational. Water for the Phase I development will be supplied by individual wells and centralized drinking water supply systems. The applicant submitted an assessment of groundwater supplies that addressed the availability of sufficient and healthful water supplies. The applicant states that sufficient and healthful water can be supplied by on-site wells. The applicant also stated that irrigation is not anticipated for the proposed project.

During its review, the Department's Division of Environmental Assessment (DEA) reviewed the applicant's analyses for Phase I of the development as this is the only project for which the applicant sought approval. Based on information submitted by the applicant, DEA recommended conditional approval of Phase I due to the fact that an initial pump test of one or more of the proposed groundwater wells on the applicant's property would be necessary to confirm whether adequate yield can be obtained without unreasonable adverse impact to off-site water supplies or protected natural resources. For this reason and based upon DEA's review, the Department determined that the applicant had made adequate provision for securing and maintaining a sufficient and healthful water supply provided that the applicant submits for review and approval the results of an aquifer test to determine whether an adequate supply of groundwater can be obtained from on-site wells without unreasonable adverse impact on off-site water supplies and any protected resources. The applicant is further required to submit a proposal for long-term monitoring of aquifer performance including target levels at on-site and off-site wells to the Department as described in the Department's Order.

6. GROUNDWATER: The appellants assert that the proposed project will have an unreasonable adverse effect on groundwater quality and on their wells. They also claim that possible future projects, for which the applicant has not filed applications, will have additional adverse impacts.

The applicant submitted a significant sand and gravel aquifer map and a Phase I Environmental Site Assessment. According to the map and assessment, the applicant's property is not located over a mapped sand and gravel aquifer. The applicant further states that water for the development will be supplied by individual on-site wells. The water will be drawn from these wells at a rate of 22,395 gallons per day and will then be discharged to on-site subsurface wastewater disposal fields.

DEA's review was limited to Phase I as this is the only project for which the applicant seeks approval. DEA confirmed that the proposed project is not located over a mapped sand and gravel aquifer and that Phase I of the Oxford Resort Casino will not impact groundwater provided that the applicant adheres to the well monitoring requirements as described in the Department's Order.

7. WASTEWATER: The appellants contend that the applicant did not demonstrate that the proposed project will have adequate capacity for wastewater disposal. They also claim that possible future projects, for which the applicant has not filed applications, will have additional adverse impacts.

The applicant proposes to install a subsurface wastewater disposal system with an Advanced Wastewater Treatment System. The applicant submitted a soil survey map, a soils report and an analysis of potential impacts to off-site groundwater quality resulting from on-site wastewater disposal.

During the Department's review, the proposed wastewater disposal system was also reviewed by the Department of Health and Human Services' Division of Environmental Health (DHHS-EH) pursuant to Chapter 11 of the Subsurface Wastewater Disposal Rules, CMR 241. On February 16, 2011, the DHHS-EH granted approval of the applicant's subsurface wastewater disposal system. For this reason, the Department determined that the proposed wastewater disposal system for Phase I of the Oxford Resort Casino would be built on suitable soil types.

8. WETLANDS & WILDLIFE: The appellants contend that the Department applied the wrong level of permit review under the NRPA, that the Department did not review other alternative options to the proposed project, and that the Department had insufficient evidence to make a determination regarding vernal pools. They also claim that possible future projects, for which the applicant has not filed applications, will have additional adverse impacts.

- A. Tier 2 vs. Tier 3 Review. The appellants argue that the Department incorrectly conducted a Tier 2 permit review under the NRPA and claims that the application should have been reviewed in accordance with Tier 3 requirements.

In order to construct Phase I of the Oxford Resort Casino, the applicant proposed to fill 42,430 square feet of forested freshwater wetlands. Therefore, the Department reviewed proposed wetland impacts as described in the applicant's application as a Tier 2 level of review in accordance with 38 M.R.S.A. § 480-X(2)(B).

- B. Avoidance. The appellants assert that the Department failed to properly review available and practicable alternatives that would be less damaging to the environment.

The applicant submitted a list of alternative off-site locations and alternative on-site designs to the proposed Phase I development of the Oxford Resort Casino. The applicant stated that the off-site alternatives were not feasible due to a significant amount of on-site wetlands, a potential significant vernal pool and other site constraints. The applicant also considered the option of siting the project in the center of its property. Following a delineation of on-site protected natural resources, the applicant determined that siting the project at this location would result in a greater amount of wetland impact.

The Department determined that that the applicant avoided and minimized wetland impacts to the greatest extent practicable.

- C. Significant Vernal Pool Habitat. The appellants contend that the Department had insufficient evidence to make a determination with regard to unreasonable adverse impacts to significant wildlife habitat because the applicant's vernal pool survey was conducted outside the identification period for an egg mass abundance count.

According to the Department's Significant Wildlife Habitat Rules, Chapter 335 (9)(B)(1), a typical and acceptable measure of determining the significance of a vernal pool is to count egg masses just past the peak breeding period of pool-breeding amphibians. In any season outside of the identification period, indicators of a potentially significant vernal pool habitat may include flat topography with depressions or pit-and-mound topography, wetland flora, fingernail clams, caddisfly cases, and evidence of temporary flooding.

The applicant submitted a wetland delineation report stating that a wetland identification and delineation study was conducted over a period of days between August 5, 2010, and November 7, 2010. The report further stated that "[g]iven that most of the field work was conducted mainly in late summer when ground water levels were down, reliance was made on identifying the topographic characteristics for a vernal pool, mainly depressions on the landscape which showed some indication of having standing water. No such areas were found."

Based upon the applicant's report, the Department determined that no vernal pools were present at or near the project site; therefore, the Department did not review the application as if a significant vernal pool existed at or near the proposed development.

**Other Considerations:** The appellants claim that the Department failed to consider all potential phases of the proposed project. The appellants further contend that the Department Order failed to consider non-point source air emissions in its review of air quality and that the Department incorrectly issued an approval of the Maine Construction General Permit (MCGP). Lastly, the appellants allege that a conflict of interest existed during the Department's review of the applications in this matter.

1. Phasing. The appellants state that the Department failed to consider all potential phases of the proposed project.

The applicant argues that Chapter 372 (10) allows the Department to approve a stand-alone project even when additional development might occur in the future. The applicant understands that if it proposes any additional development in the future, the Department is required by Chapter 372 (10) to assess and address the secondary and cumulative impacts of the entire development at that time.

2. Air Quality. The appellants state that the Department should have considered the amount of traffic that may be generated at the project site.

The applicant stated that potential sources of air emissions from the proposed project are the generation of dust during construction and the proposed building's heating system. The applicant stated that the air emission output from the proposed building's heating system will be less than 10,000,000 Btu, which is the threshold for which an air emission license is required by the Department. The applicant further stated that traffic is expected to move on and about the site.

The Department considered all potential sources of air emissions, including traffic. The Department did not request the applicant to model non-point source air emissions at the project site because the Department does not typically require a non-point source air emissions model unless there would be a significant amount of waiting and idling of traffic.

3. MCGP. Appellants argue that the MCGP expired on January 20, 2008 and that the provisions for an administrative continuance of the MCGP are not applicable to new permit holders.

The applicant contends that the administrative continuance of the MCGP applies to all permit holders, not just existing permit holders.

4. Conflict of Interest. The appellants challenge former Commissioner Darryl Brown's standing with respect to the issuance of water quality certification for the proposed project.

The Board does not have authority to assume jurisdiction to address the issue of conflict of interest or consider the matter as a basis for determining whether permitting requirements have been satisfied under the applicable laws for any particular project.

**Department Recommendation:** After reviewing the appellants' arguments and the applicant's response to the appeal, the Department concludes that the applicant met the requirements for a Site Law and NRPA permit. The Department recommends that the Board deny the appellants' request for a public hearing, to stay all work on the project, to reopen the record, and to assume jurisdiction over the application. The Department further recommends that the Board affirm and modify the Department's decision to approve construction of Phase I of the Oxford Resort Casino as outlined in Department Order #L-25203-28-A-N/L-25203-TE-B-N provided that submit additional documentation of financial capacity to the Department for its review and approval prior to resuming construction as described above.

**Estimated Time of Presentation:** 4 hours